

The Nature and Consequences of Avoidance of the Contract Under the United Nations Convention on the International Sale of Goods

Michael Bridge*

I. General

Section V of the CISG is concerned with the restitutionary effects of avoidance of the contract. Where performance has been exchanged under the contract, the seller and the buyer have to make mutual restitution of the performance received from the other party. In addition, the parties are bound to make mutual restitution of the fruits of performance, so the seller must repay the price with interest and the buyer must return the goods and also "account for" any benefits received from the goods in the buyer's hands. Beyond those basic provisions, the CISG says nothing about the way in which restitution is to be effectuated. This article seeks to demonstrate that restitution under the CISG involves the performance of a resale contract that cancels out the initial sale contract. It further seeks to demonstrate that this resale contract, for reasons given below, cannot be a simple mirror image of the original sale contract.

The rules laid down by the CISG for dealing with the effects of avoidance go beyond Part V and are both contractual and restitutionary in character. The basic rules of restitution have been stated above. Nevertheless, the performance of restitution may also bring in contractual rules, especially where the contract has not been fully performed on

* Professor of Law, London School of Economics. This paper is a slightly modified version of a paper given at the Conference on the Application and Interpretation of the CISG in Member States with Emphasis on Litigation and Arbitration in the P. R. China held at Wuhan University in October 2007.

both sides. An example of this is the damages rules in Articles 75-76, brought into play where the seller does not deliver or the buyer does not take delivery of the goods. These contractual rules are predicated on the avoidance of the contract, but they are not to be found in Section V of the Convention. Depending upon how the rules of restitution, so barely expressed in the CISG, are filled out, there may also be damages claims arising out of the restitutionary process itself. The view expressed in this article is that the amplified rules of restitution should be defined so as to minimise any damages claims.

The CISG does not deal with proprietary matters and consequently has nothing to say on the subject whether, upon avoidance, the seller re-acquires a proprietary interest in the goods. It is not even clear whether a buyer, when accounting for benefits, is free to return the very benefits obtained from the goods (in those cases where this might be possible) or must instead return the financial equivalent of those benefits. The word "account" has financial overtones.

The CISG is able to avoid direct involvement with the proprietary consequences of restitution because it lays down a principle of concurrent restitution in Article 81 (2). Each party's security for the return of performance by the other party lies in the retention of the corresponding performance until the exchange is effectuated. It will be left to the applicable law to determine at what point in the restitutionary process the property in the goods, as well as in accompanying benefits, vest in the seller. The same point may also be made in relation to the restoration of the price with interest.

The CISG, though using the expression "avoidance" instead of the more natural "termination" appears to subscribe to a notion of prospective avoidance. This means that, upon avoidance, the contract is not retrospectively set aside. Instead, according to Article 81 (1), certain of its clauses survive (for example, dispute resolution clauses). Moreover, any right to recover consequential damages under Article 74 should also survive avoidance as this matter concerns "the rights and obligations of the parties consequent upon the avoidance of the contract". Nevertheless, the process of mutual restitution does bear some resemblance to a retrospective rather than a prospective process. The prospective character of avoidance is best seen, not in contracts that have been fully performed (though defectively), but in contracts that call for performance in instalments or at intervals.

This article will focus on a few selected features of the restitutionary process.

II. Concurrency

Article 81 (2) requires restitution between seller and buyer to be concurrent.^① There is an exception to full concurrency. The seller may not object to restitution in those cases under Article 82 where the avoiding buyer is excusably unable to redeliver all the goods.^② Furthermore, since nothing in Article 81 deals with the existence of property rights in the goods or money subject to the restitutionary process, the effect of a reservation of title clause is a matter for the applicable law and not for the CISG.^③ Similarly, a seller's right to recover the goods on avoidance is subject to relevant property and insolvency laws.^④ If restitution by one party is prevented by national laws dealing with bankruptcy or currency restrictions, for example,^⑤ the party who is not prevented by these laws from making restitution is protected by the concurrency rule from having to make restitution.

There is no reference to concurrency in Article 84, dealing with the restitution of interest and benefits. Although the principle of concurrency is not expressed, consistency therefore requires it also to be the rule under Article 84 following on from the general principle laid down in Article 81.^⑥

Although there are numerous decisions stating that set-off is not dealt with by the CISG,^⑦ there are many different ways in which set-off might arise between a buyer and a seller. Set-off is explicitly permitted in Article 88, where a buyer avoiding the contract is

① Kantonsgericht Schaffhausen (Switzerland), 27 January 2004, <http://cisgw3.law.pace.edu/cases/040127s1.html> ("reciprocally and simultaneously"), last visited December 1, 2007.

② Landgericht Freiburg (Germany), 22 August 2002, <http://cisgw3.law.pace.edu/cases/020822g1.html>, last visited December 1, 2007.

③ Article 4 (b).

④ Federal District Court Illinois (United States), 28 March 2002 (*Usinor Industeel v. Leeco Steel Products*), available at <http://cisgw3.law.pace.edu/cases/020328u1.html>, last visited December 1, 2007.

⑤ See Secretariat Commentary on Article 66 (which was later renumbered Article 81), para. 10.

⑥ Also Article 58 (1).

⑦ For example, Bundesgerichtshof (Switzerland), 20 December 2006, translated at <http://cisgw3.law.pace.edu/cases/061220s1.html>, last visited December 1, 2007; Landgericht München (Germany), 20 March 1995, translated at 950320g1.html, last visited December 1, 2007.

permitted to sell the goods for one of the reasons stated in Article 88. The expenses of preserving the goods and selling them may be deducted from the proceeds of sale, prior to their remittance to the seller. So far as there has to be concurrency in making restitution, and so far as payments have to be made by both buyer and seller as part of the restitutionary process, then concurrency is most effectively promoted by permitting set-off. ① It will not however be easy to effect a set-off where the process of restitution under Article 81 needs to be implemented before the calculations are made under Article 84.

III. Time, Place and Cost of Restitution

The CISG calls for a resale of the goods from the buyer to the seller but it does not express the rules concerning the place and costs of restitution and the allocation of risk under that resale. There are, however, rules concerning the preservation and disposal of the goods after avoidance. ② The buyer also has an actionable right for the seller to take redelivery of the goods. ③

A. Time

The CISG does not state when mutual restitution of performance has to take place. In the absence of an agreed time, restitution within a reasonable time may be inferred as a general principle under Article 7 (2). ④ A reference to a reasonable time may be found, for example, in Article 33 which concerns the seller's basic duty of delivery, and in the rules concerning the laying down of additional time for performance in Articles 47 and 63.

① In favour of set-off, further to Article 7 (2), where there are two reciprocal claims arising under the CISG, see Oberlandesgericht Hamburg (Germany), 26 November 1999, translated at <http://cisgw3.law.pace.edu/cases/991126g1.html>, last visited December 1, 2007; Landgericht Mönchengladbach (Germany), 15 July 2003, translated at <http://cisgw3.law.pace.edu/cases/030715g1.html>, last visited December 1, 2007. A deduction for the cost of goods disposed of by the buyer against the buyer's claim for the return of the price was allowed in Oberlandesgericht Köln (Germany), 14 October 2002, translated at <http://cisgw3.law.pace.edu/cases/021014.html>, last visited December 1, 2007.

② Articles 86-88.

③ Landgericht Krefeld (Germany), 24 November 1992, Unilex.

④ Article 33 (c).

B. Place—Buyer Avoidance

The place of restitution is not dealt with expressly by the CISG but is determined by the general principles on which it is based. ① Suppose that the contract of sale calls for delivery of the goods at the seller's premises and, after the goods have been handed over, the buyer avoids the contract for the seller's unexcused fundamental breach of contract. The better rule would seem to be to have the seller take delivery from the buyer's premises and not require the buyer to return the goods to the place from which the buyer took delivery. ② Otherwise, there would be an additional damages liability of the seller under Article 74 if the buyer had to pay the costs of carriage back to the seller. Furthermore, the buyer would not be able to insist on reimbursement of these carriage costs before handing the goods over. The avoidance of economic waste may be seen as a general principle underlying the CISG. ③ Redelivery at the buyer's premises would facilitate the disposal of the goods by the seller in the local market and thus minimise the costs of the restitutionary process. In addition, redelivery at the buyer's premises avoids the complications of allocating risk in transit. It would also delay the process of restitution if the buyer had to hands over the goods at the seller's premises, thus adding further to the cost of restitution. Redelivery at the buyer's premises is or should be therefore the general rule.

The place of repayment of the purchase price is also not dealt with expressly by the CISG. Treating the seller as the buyer of the redelivered goods, the price should be

① Oberster Gerichtshof (Austria), 29 June 1999, Unilex, translated at <http://cisgw3.law.pace.edu/cases/990629a3.html>, last visited December 1, 2007. Cf Cour d'appel de Paris (France), 14 January 1998, Unilex, translated at <http://cisgw3.law.pace.edu/cases/980114f1.html> (applying rules of private international law under Article 7 (2) so that the place of repayment was the debtor's (i. e., the seller's) residence), last visited December 1, 2007.

② Kantonsgericht Valais (Switzerland), 21 February 2005, translated at <http://cisgw3.law.pace.edu/cases/050221s1.html>, last visited December 1, 2007. *But see* P Schlechtriem and I Schwenzer, *Commentary on the UN Convention on the International Sale of Goods*, 2nd (English) edn, Oxford University Press, 2005, pp. 860-861, for the view that the place of redelivery should be an exact reversal of the place of delivery.

③ See Articles 25 (the rule of fundamental breach does not lightly permit avoidance) and 77.

repayable at the buyer's premises. ① By way of exception, if payment under the contract of sale has been made by a bank transfer, repayment by the same method to a bank of the buyer's choice represents the most practical method of effecting restitution.

C. Place—Seller Avoidance

Where the seller avoids the contract for the buyer's unexcused non-performance, it is less clear that redelivery should be required at the buyer's premises. If redelivery did take place there, the seller would have an action for damages against the buyer under Article 74 for any consequent costs of carriage. Nevertheless, the likely cause of a seller avoiding the contract is where the buyer fails to pay for the goods, in which case the seller would have a practical interest in taking an active position and expediting the redelivery process. The requirement of mitigation of loss in Article 77 might also require such behaviour by the seller. This points to the efficacy of a clear rule in all cases, including cases where the contract is avoided for excusable non-performance, that redelivery should take place at the buyer's premises.

D. Costs of Restitution

Even though restitution may have taken place in full, with redelivery of the goods at the buyer's premises, there will frequently be additional costs arising out of the subsequent disposal of the goods. Any such additional costs of restitution should be borne by the unexcused non-performing party. ② If, for example, goods already delivered to the buyer have to be shipped back to the seller, the cost of carriage should be borne by the

① Article 57 (1) (a); Landgericht Giessen (Germany), 17 December 2002, translated at <http://cisgw3.law.pace.edu/cases/021217g1.html> (departing from the contrary decision under the ULIS of the Bundesgerichtshof, BGHZ 78, 257), last visited December 1, 2007. See also P. Schlechtriem and I. Schwenzer, *Commentary on the UN Convention on the International Sale of Goods*, 2nd (English) edn, Oxford University Press, 2005, p. 860, for apparent support for this rule, treating the buyer restoring the goods as the seller and relying on Oberlandesgericht Düsseldorf (Germany), 2 July 1993, translated at <http://cisgw3.law.pace.edu/cases/930702g1.html>, last visited December 1, 2007, which asserts the existence of a general rule in the CISG that payment in all cases takes place at the seller's premises.

② See Secretariat Commentary on Article 66 (which was later renumbered Article 81), para. 11; CM Bianca and MJ Bonell, *Commentary on the International Sales Law* (1987), 605 (Tallon).

unexcused buyer. In those cases where avoidance follows excused non-performance, ① the cost of carriage back to the seller should not be borne by the excused buyer, who is exempt from liability for in damages non-performance in Article 79. This exemption is expressed in general terms as an exemption from paying damages under the CISG, and not in special terms as an exemption from paying damages for the non-performance that led to avoidance of the contract. ②

IV. Calculating the Benefits

Some of the most interesting questions arise under Article 84, which deals not with the restitution of goods and money but with restitution of interest and benefits.

A. Interest

The seller's duty to pay interest under Article 84 runs from the date that payment is made. In the case of a seller who fails to deliver, it does not run from the time that the seller was in breach of contract for failing to deliver. ③ Consequently, if prepayment by the buyer under the contract of sale was designed to benefit the seller, the avoidance of the contract means that the seller will have to forfeit the interest that it would have retained had the contract run its course. ④ If payment is made on the buyer's behalf by a third party, the seller's duty to pay interest runs from this date. ⑤ The CISG does not define when payment is made but the purpose underlying the restitutionary provisions of the CISG

① Article 79 is likely to be applied infrequently to cases where goods have been delivered.

② Paragraph (5). See also C. M. Bianca and M. J. Bonell, *Commentary on the International Sales Law*, Tallon, 1987, p. 605.

③ Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, No 135/2002, 16 June 2003, translated at <http://cisgw3.law.pace.edu/cases/030616r1.html>.

④ If it is the seller avoiding the contract for the buyer's unexcused non-performance, this loss of the seller's benefits caused by avoidance, should be recoverable from the buyer in the form of damages under Article 74.

⑤ Cour d'appel Aix-en-Provence (France), 21 November 1996, translated at <http://cisgw3.law.pace.edu/cases/961121f1.html>, last visited December 1, 2007; Cour de cassation (France) 26 May 1999, translated at <http://cisgw3.law.pace.edu/cases/990526f1.html>, last visited December 1, 2007.

is best served by treating payment as having occurred when the seller is able to start earning interest on the money paid by the buyer.

The CISG does not state from where the rate of interest is to be derived; seller and buyer will usually be located in different countries. Interest is payable by the seller whether in fact interest has been earned or not, based on the use that the seller could have made of the money paid by the buyer.^① The seller's duty to pay interest therefore presumes that the money has been invested in an interest-bearing account. This presumption avoids any inquiry into the actual use made by the seller of the money paid by the buyer and thus also avoids difficult questions arising out of tracing the money through the seller's commercial activities.

Because of this presumption, and because the seller's duty to account for interest is a restitutionary one, the interest rate current at the seller's place of business should be applied.^② In the majority of cases, the rate at the seller's place of business has been arrived at by applying the forum's rules of private international law.^③ A preferable

^① ICC Court of Arbitration, No 6653 of 25 March 1993, translated at <http://cisgw3.law.pace.edu/cases/936653i1.html>, last visited December 1, 2007; Handelsgericht Zürich, 5 February 1997, translated at <http://cisgw3.law.pace.edu/cases/970205s1.html>.

^② P Schlechtriem and I Schwenzer, *Commentary on the UN Convention on the International Sale of Goods*, 2nd (English) edn, Oxford University Press, 2005, pp. 885-886.

^③ Oberlandesgericht Celle (Germany), 24 May 1995, translated at <http://cisgw3.law.pace.edu/cases/950524g1.html>, last visited December 1, 2007; Landgericht Landshut (Germany), 5 April 1995, translated at <http://cisgw3.law.pace.edu/cases/950405g1.html>, last visited December 1, 2007; the Oberlandesgericht Karlsruhe (Germany), 19 December 2002, translated at <http://cisgw3.law.pace.edu/cases/021219g1.html>, last visited December 1, 2007; the ICC Court of Arbitration, Award No 9978, March 1999, Unilex, CISG On-line; Tribunale d'appello Lugano/Ticino (Switzerland), 15 January 1998, translated at <http://cisgw3.law.pace.edu/cases/980115s1.html>; Bezirksgericht Saane (Switzerland), 20 February 1997, translated at <http://cisgw3.law.pace.edu/cases/970220s1.html>, last visited December 1, 2007; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, No 175/2003, 28 May 2004, translated at <http://cisgw3.law.pace.edu/cases/040528r1.html>, last visited December 1, 2007; Oberlandesgericht Frankfurt am Main (Germany), 18 January 1994, translated at <http://cisgw3.law.pace.edu/cases/940118g1.html>, last visited December 1, 2007; Kantonsgericht Schaffhausen (Switzerland), 27 January 2004, <http://cisgw3.law.pace.edu/cases/040127s1.html>, last visited December 1, 2007. Although it conceded that the buyer's entitlement to interest derived from the CISG, the same approach was adopted by the Oberlandesgericht München (Germany), 8 February 1995, translated at <http://cisgw3.law.pace.edu/cases/950208g1.html>, last visited December 1, 2007. In one case, the rate was determined according to the applicable law, which was neither the law of the seller's nor of the buyer's place of business: ICC Court of Arbitration, No 7660, 23 August 1994, translated at <http://cisgw3.law.pace.edu/cases/947660i1.html>, last visited December 1, 2007.

justification is to infer the rate at the seller's place of business directly from Article 84 itself. ① A minority of tribunals have favoured the rate of interest prevailing at the buyer's place of business, ② which is inconsistent with the restitutionary character of the seller's duty to pay interest. ③

① See Secretariat Commentary on Article 69 (which was later renumbered Article 84), para. 2; Handelsgericht Zürich (Switzerland), 5 February 1997, translated at <http://cisgw3.law.pace.edu/cases/970205s1.html>, last visited December 1, 2007. The source of the rule that the rate at the seller's residence should apply was left open in Oberlandesgericht Düsseldorf (Germany), 28 May 2004, translated at <http://cisgw3.law.pace.edu/cases/040528g1.html>, last visited December 1, 2007. The seller was Italian and the result would have been the same whether an Italian interest rate was inferred directly from Article 84 or applied by virtue of private international rules, since Italy was the place of business of the characteristic performer (the seller).

② Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, No 99/2002, 16 April 2003, translated at <http://cisgw3.law.pace.edu/cases/030416r1.html>, last visited December 1, 2007; China International Economic and Trade Arbitration Commission, 30 November 1998, translated at <http://cisgw3.law.pace.edu/cases/981130c1.html>, last visited December 1, 2007; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, No 133/1994, 19 December 1995, translated at <http://cisgw3.law.pace.edu/cases/951219r1.html> (but rate not proved by the buyer), last visited December 1, 2007; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, No 1/1993, 15 April 1994, Unilex; Hof van Beroep Gent (Belgium), 11 September 2003, noted at <http://cisgw3.law.pace.edu/cases/030911b1.html>. That same law would also have been applied but for the absence of a Russian rate of interest for Indian rupees in Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, No 100/2002, 19 May 2004, translated at <http://cisgw3.law.pace.edu/cases/040519r1.html>, last visited December 1, 2007. The tribunal applied instead the Unidroit rule (Article 7.4.9(2)), namely, the average short-term lending rate for prime borrowers in the place of payment, failing which, in the place of the currency of repayment. A Hamburg arbitral tribunal has also applied the local law in the case of a German buyer and Czech seller: Schiedsgericht Hamburger Freundschaftliche Arbitrage (Germany), 29 December 1998, translated at <http://cisgw3.law.pace.edu/cases/981229g1.html>, last visited December 1, 2007.

③ The approach that seems to have been adopted in Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, No 53/1997, 25 December 1997, translated at <http://cisgw3.law.pace.edu/cases/971225r1.html>, last visited December 1, 2007; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, No 439/1995, 29 May 1997, translated at <http://cisgw3.law.pace.edu/cases/970529r1.html>, last visited December 1, 2007; Tribunal of International Commercial (转下页)

The CISG does not state when the seller's duty to pay interest should cease. In principle, the restitutionary character of the seller's duty ought to mean that interest runs until the buyer has been reimbursed,^② but it has been held in one case, incorrectly, to run to the date of commencement of the proceedings.^③

Nothing in the CISG refers to the currency in which interest should be paid. Payment of interest, if submitted, ought to be presumptively in the currency of account and payment, provided that these are the same,^④ and ought to be in the currency of payment if this is different from the currency of account. This presumption, however, should be treated as a rebuttable one. Since the seller's duty to pay interest is a restitutionary one, interest should as a matter of principle be paid in the currency in which the seller earned the interest if this differs from the currency of payment.

(接上页) Arbitration at the Russian Federation Chamber of Commerce and Industry, No 72/1995, 25 April 1996, translated at <http://cisgw3.law.pace.edu/cases/960425r1.html>, last visited December 1, 2007; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, No 22/1995, 1 December 1995, translated at <http://cisgw3.law.pace.edu/cases/951201r2.htm>, last visited December 1, 2007; Juzgado de primera instancia Tudela (Spain), 29 March 2005, translated at <http://cisgw3.law.pace.edu/cases/050329s4.html>, last visited December 1, 2007. An award of interest, incorrectly, as damages has led also to the buyer's law: *Käräjäoikeus Kuopio* (Finland), 5 November 1996, translated at <http://cisgw3.law.pace.edu/cases/961105f5.html>, last visited December 1, 2007.

② As decided by Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, No 1/1993, 15 April 1994, translated at <http://cisgw3.law.pace.edu/cases/940415r1.html>, last visited December 1, 2007; Pretura circondariale Parma (Italy), 24 November 1989, translated at <http://cisgw3.law.pace.edu/cases/891124i3.html>.

③ Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, No 100/2002, 19 May 2004, translated at <http://cisgw3.law.pace.edu/cases/040519r1.html>, last visited December 1, 2007.

④ This was the result in China International Economic and Trade Arbitration Commission, 10 March 1995, translated at <http://cisgw3.law.pace.edu/cases/950310c2.html>, last visited December 1, 2007.

B. Accounting for Benefits from the Goods

The buyer's duty to account for benefits received under Article 84, unlike the seller's duty to pay interest, is based on benefits that are proved by the seller^① and not presumed. These benefits should also be net benefits, after the cost of using or enjoying the goods has been taken into account.^② There will be many cases where a buyer, despite delivery having occurred long before avoidance, will have received no measurable benefits. An example is where the goods have been sold on to a domestic sub-buyer who has eventually rejected them or who may yet reject them.^③ Any money derived from that sub-buyer does not count as a benefit under the head contract of sale if it has to be returned to the sub-buyer, since Article 84 concerns only retained benefits.^④

V. Conclusion

The lack of details in the CISG on implementing the restitutionary obligations of the parties make Part V one of the least easily understood parts of the Convention. The key to understanding these provisions is to treat them, so far as possible, as imposing the least possible burden on a party who avoids the contract for the other's non-performance. A theme that is only briefly referred to in this short article is the application of the rules of restitution where avoidance takes place after excused non-performance. Practical reasons are likely to call for the same redelivery and repayment burdens as arise in the case of avoidance for unexcused non-performance. One thing is certain; Part V of the CISG possesses a considerable capacity to surprise by throwing up problems that have not been foreseen.

① The seller was able to prove a sub-sale by the buyer in *Compromex Arbitration (Mexico)*, 4 May 1993, translated at <http://cisgw3.law.pace.edu/cases/930504m1.html>, last visited December 1, 2007.

② P. P. Schlechtriem and F. Schwenzer, *Commentary on the UN Convention on the International Sale of Goods*, 2nd (English) edn, Oxford University Press, 2005, p. 889.

③ *Oberlandesgericht Oldenburg (Germany)*, 1 February 1995, translated at <http://cisgw3.law.pace.edu/cases/950201g1>, last visited December 1, 2007.

④ *Landgericht Freiburg (Germany)*, 21 August 2002, translated at <http://cisgw3.law.pace.edu/cases/020822g1.html>, last visited December 1, 2007.